

while knowing that the cash-out is fated to happen and how compensations are set. Concerning the bad act of majority shareholders, some of them indicate that other ex-ante measures (an injunction against cash-out) and ex-post measures (an invalidation of cash-out) are sufficient to inhibit the opportunistic behaviors. On this ground, the conclusion of this case is supported by some².

6. Labor/Social Security Law

X v. Iryo Hohjin Shadan Kohshinkai

Supreme Court 2nd P.B., July 7, 2017

Case No. (*jyu*) 222 of 2016

256 MINSHU 31

Summary:

Even though there is an agreement in which extra wages such as for overtime are included in an annual salary, under the circumstances when the part of the extra wages among the annual salary is not clear, and when it is impossible to make a distinction between the part of the wages for regular work time and the part for extra wages, it is impossible to say that extra wages are paid through the payment of annual salary.

Reference:

Article 37 of Labor Standard Act

Facts:

1. In April 2012, the appellant (a plaintiff of the first instance, and an appellant of the second instance) was employed as a doctor by the appellee (a defendant of the first instance, and an appellant of the second instance), medical corporation. His wages were set on an annual salary

² See, e.g., Kenichi Matsuo, *Case Note*, 447 HOUGAKUKYOSHITSU 149, 149 (2017); Kaoru Tatsumi, *Case Note*, 65 (24) KINYU HOUMUJJO = BANKING LAW JOURNAL 44, 49 (2017) (both are written in Japanese).

(17 million yen a year) which was composed of (i) a base salary (860 thousand yen per month), (ii) some allowances (341 thousand yen per month in total) and (iii) a bonus (equivalent to 3 months base salary). His regular working hours were set at 5 days a week and 8 hours a day, and overtime work, such as an emergency service or a night duty, was required in case of the necessity under the rule about the overtime work of the appellee, which also stipulated a except overtime considered as extension of normal duties payment of extra wages or allowances against the above-mentioned work. The appellant and the appellee also agreed that extra wages were included in an annual salary except the above-mentioned extra wages or allowances paid against a night duty, etc., on the basis of the rule of the appellee. However, it was not clear whether the extra payment for other overtime work was included in the annual salary or not.

2. Till the end of September 2012, the appellant worked overtime (about 374 hours including night duties). The appellee paid to the appellant extra wages (575.3 thousand yen in total which corresponds approximately-to 30 hours' extra wages).

3. The appellee gave a notice of dismissal to the appellant at the end of August 2012. The appellant brought an action for a contractual status, the payment of unpaid extra wages based on article 37 of LSA, a payment of the same amount of an additional amount based on the article 114 of LSA, and so on.

4. The decision of the first instance (the decision of the Tokyo District Court, April 23, 2015, 1168 RODO HANREI 61) and the second instance (the decision of the Tokyo High Court, October 7, 2015, 1168 RODO HANREI 55) both rejected the appellant's claim because of the existence of an individual agreement in which extra payment was included in the annual salary, his high income, the character of the discretionary work of doctors and so on, except extra wages for the overtime beyond 60 hours per month and for late-night work (i.e. partially accepted). The appellant made a final appeal to the Supreme Court about the payment of unpaid extra wages and the payment of the same amount of an additional amount: judgment for the other dispute became final.

Opinion: *The court quashed and remanded the case.*

1. “It is construed that the object of article 37 of the LSA that forces an employer to pay extra wages for overtime is to reduce the amount of hours of overtime by forcing the payment of extra wages and to compensate the worker in that way (see *Shizuoka Prefecture staff case*, the Supreme Court, April 6, 1979, 26-3 MINSHU 397), ...and that the same article (article 37 of the LSA) forces only to pay extra wages in a manner not inferior to the amount calculated by 37 of the LSA, etc. Thus, it does not immediately constitute a violation of the same article to pay extra wages in advance by including them in a base salary or other allowances.”

2. “It is required to examine whether the amount paid as extra wages is not inferior to the amount calculated by the article 37 of the LSA, etc. to say that an employer paid extra wages obligated in the article 37 of the LSA. When extra wages such as for overtime are paid in a base salary or other allowances, it is necessary to be able to make a distinction between the part of the wages for regular work time and that for overtime on the employment contract in consideration of the above-mentioned object (see *The Kochi Sightseeing case*, the Supreme Court, June 13, 1994, 172 MINSHU 673, *The Tec Japan case*, the Supreme Court, March 8, 2012, 240 MINSHU 121, *The Kokusai Jidosha case*, the Supreme Court, February 28, 2017, 255 MINSHU 1). Thus, an employer has a duty to pay the amount of the difference to his employee when the amount of the part for extra wages is inferior to the amount calculated through the article 37 of the LSA, etc.”

3. In this case, “even though there is an agreement which extra wages are included in an annual salary, the part of extra wages is not clarified on the employment contract, ...thus, it is impossible to say that extra wages for overtime were paid through the payment of the annual salary.”

Editorial Note:

1. This case was concerned with a high-income worker who was not paid extra wages because there was an agreement between the two parties in which extra wages were included in a base salary or other allowances. The issue was the legality of such way of paying, especially for a high-income worker.

2. Article 37 of LSA forces an employer to pay extra wages for (i) working hours beyond 40 hours per week or 8 hours per day, i.e. overtime beyond the legal standard working hours stipulated in the article 32 of LSA (extra pay rate is more than 25% over the normal wages, on the other hand 50% in case of the part of overtime beyond 60 hours per month with some exceptions), (ii) legal holidays (more than 35%) and (iii) late-night work between 10 p.m. to 5 a.m. (more than 25%).

3. However, in practice, it often happens that an employer pays employees extra wages in advance by including them in a base salary or under the name of several allowances (e.g. position allowance) for avoiding a complicated calculation. It has been shown in an administrative interpretation by Labor Standards Bureau (hereinafter LSB) that it is not necessary to obey a way of legal calculation of extra wages (article 37 of LSA, etc.) as long as the amount of money paid to employees is superior to the legal amount. Similarly, many judicial precedents agreed on this point and also showed criteria for the legality of such a way of paying: necessity of a distinction between the part of wages for regular work time and that for the extra wages on the employment contract to be able to confirm the satisfaction of the requirement of the article 37 of LSA.

4. However, in the case when the above distinction did not exist but, on the other hand, it is concerned with a high-income worker (at least 20 million yen per year), a lower court held it legal on the ground that it was not against the object of compensation of article 37 (*the Morgan Stanley Japan case*, Tokyo District Court, October 19, 2005, 905 RODO HANREI 5). Some doctrine found the judgement gave exceptional approval of the system of so-called “White-Collar Exemption” (i.e. exemption from regulations on working hours, etc.), but others criticized it because the judgment ignored the character of the mandatory law of the LSA and it did not respect the meaning of the exceptional stipulation such as a discretionary labor system provided in articles 38-3 and 38-4 of LSA.

5. In this case, the judgment of the first and the second instance took the character of the doctor’s work (discretion), high-income, etc., into consideration to appreciate the necessity of payment of extra wages in

accordance with LSA. However, this judgment of the Supreme Court returned to the principle of legality about which extra payments are included in a base salary or other allowances, regardless of the character of the works or amount of income. In other words, a clear distinction of extra wages from a base salary or allowances on the employment contract is still an essential condition. From this perspective, we can estimate that this judgment denied the above-mentioned judicial precedent. In fact, after this judgment, LSB emitted a notification to each prefectural Labor Standards Office, referring to this judgment, about the appropriate way of paying extra wages by including them in a base salary or other allowances.

7. International Law and Organizations

Claims for damages and an injunction against loud blast of Kadena Air Base

Okinawa Branch of the Naha District Court, February 9, 2017,
Case No. (*wa*) 422 of 2012, Case No. (*wa*) 190 of 2016

Summary:

This is a case where Japanese citizens, who resided near Kadena Air Base in Okinawa (hereinafter, the Base), filed the claim for their several damages due to noises from the Base and an injunction against the nighttime landing practice of the Base. The issue of this case was whether Japanese court may exercise its civil jurisdiction over the United States of America, that is, a foreign state.

In principle, the defendant, as a foreign state, enjoys the civil jurisdictional immunity before Japanese courts because Art. 4 of the Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc. (hereinafter, the Act) provides “A Foreign State, etc., except as otherwise provided by this Act, shall be immune from jurisdiction (meaning the civil jurisdiction of Japan; the same shall apply hereinafter)”. However, the plaintiffs negated of the defendant’s immunity in this case, invoking Arts. 10 and 11 of the Act, which exceptionally denies Foreign State’s immunity in the case of a compensation for death or injury of persons or loss, etc. of